No. 74-712

Supreme Court U. S.
APR 10 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP L. BORNSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

IRVING JAFFE,
Acting Assistant Attorney General,

KEITH A. JONES,
Assistant to the Solicitor General,

STEPHEN F. EILPERIN,
DAVID M. COHEN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Summary of argument	7
Argument:	
I. A subcontractor who fraudulently causes his prime contractor to present to the United States multiple false claims for payment in connection with a government contract is liable for multiple forfeitures under the False Claims Act	11
A. The statutory text prescribes a separate $2,000 forfeiture for each false claim for payment that a subcontractor causes to be presented to the United States	12
B. The imposition of multiple forfeitures furthers the objectives of the Act	19
II. Under the False Claims Act, single damages resulting from a subcontractor's fraud are not reduced by the amount of any recoveries from the prime contractor	26
Conclusion	31

CITATIONS

Cases: Page

Daniel v. *United States*, 234 F. 2d 102 ... 13
Faulk v. *United States*, 198 F. 2d 169 ... 13, 27
Rex Trailer Co. v. *United States*, 350 U.S. 148 ... 13
Shea v. *Vialpando*, 416 U.S. 251 ... 15
Toepleman v. *United States*, 263 F. 2d 697, certiorari denied, 356 U.S. (1959) ... 13, 15, 22, 27
United States v. *Ben Grunstein & Sons Co.*, 137 F. Supp. 197 ... 27
United States v. *Collyer Insulated Wire Co.*, 94 F. Supp. 493 ... 20, 27
United States v. *Globe Remodeling Co.*, 196 F. Supp. 652 ... 28, 29
United States v. *Grannis*, 172 F. 2d 507, certiorari denied, 337 U.S. 918 ... 13
United States v. *McNinch*, 356 U.S. 595 ... 13, 16, 19
United States v. *National Wholesalers*, 236 F. 2d 944, certiorari denied, 353 U.S. 930 ... 13, 17
United States v. *Neifert-White Co.*, 390 U.S. 228 ... 8, 16, 19, 23
United States v. *Rohleder*, 157 F. 2d 126 ... 13
United States v. *Rubin*, 243 F. 2d 900 ... 13
United States v. *Ueber*, 299 F. 2d 310 ... 6, 8, 12-13, 14-15, 17
United States v. *Woodbury*, 359 F. 2d 370 ... 7, 13
United States ex rel. Marcus v. *Hess*, 317 U.S. 537, reversing 127 F. 2d 233, reversing 41 F. Supp. 197 ... 7, 8, 9, 12, 15, 17, 18, 20-21, 23

Statutes: Page

False Claims Act, 12 Stat. 696, 698, 31 U.S.C. 231 ... 2, 12
Revised Statutes:
Section 3490 ... 12
Section 5438 ... 12
Surplus Property Act, 63 Stat. 392, 40 U.S.C. 489(b) ... 13
18 U.S.C. 287 ... 12, 30
18 U.S.C. 1001 ... 12, 30

Miscellaneous:

Cong. Globe 952 (37th Cong., 3d Sess.) ... 19
Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 Minn. L. Rev. 669 (1962) ... 27

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-712

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP L. BORNSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 504 F. 2d 368. The opinion of the district court (Pet. App. C) is reported at 361 F. Supp. 869.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on September 4, 1974. On December

2, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including December 7, 1974. The petition was filed on December 6, 1974, and was granted on January 27, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a subcontractor who fraudulently causes his prime contractor to present to the United States multiple false claims for payment in connection with a government contract is liable for multiple forfeitures under the False Claims Act.

2. Whether, under the False Claims Act, single damages resulting from a subcontractor's fraud are reduced by the amount of any recoveries from the prime contractor.

STATUTE INVOLVED

The False Claims Act, 12 Stat. 696, 698, 31 U.S.C. 231, in pertinent part provides:

> Any person * * * [1] who shall make or cause to be made, or present or cause to be presented, for payment or approval, * * * any claim upon * * * the United States, or any department or officer thereof, knowing such claim to be false * * * or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States * * * by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act * * *.

STATEMENT

This case arises out of a government contract for the procurement of radio kit sets for the Department of the Army.[1] The contract provided, *inter alia*, that the prime contractor, Model Engineering and Manufacturing Corp., Inc. ("Model"), would equip each of the kits with a specified type of electron tube bearing special markings to indicate that it had passed government inspection (Pet. App. C, p. 21A, n. 2).[2] Model entered into a subcontract with United Na-

---

[1] The case was tried before the district court on the basis of stipulated facts, which are set forth in full at App. 38-51. The opinions of both the district court (Pet. App. C, pp. 20A-27A) and the court of appeals (Pet. App. A, pp. 1A-4A) describe these facts in detail. In the interest of ready comprehensibility and for the convenience of the Court, we are here presenting only a summary of those facts.

[2] The contract called for 4X150G electron tubes bearing the marking "JAN" (an acronym for "Joint Army Navy"), a brand designation, registered by the Patent Office, that indicates that the material has passed government inspection (Pet. App. C, p. 21A).

tional Labs ("United"), a corporation operated and managed by respondents, for the purchase of the necessary tubes.

Respondents, acting through United, purchased approximately four hundred nonconforming tubes and falsely branded them to indicate that they had been inspected by the government, whereas in fact the tubes had not been inspected (Pet. App. C, p. 24A).[3] Respondents made three separate shipments of the falsely branded tubes to Model; each shipment was accompanied by a "Certificate of Compliance" that falsely certified that the tubes conformed with the contract specifications (Pet. App. C, p. 25A). Model incorporated the tubes into radio kits and shipped the kits to the Department of the Army in 35 lots, each of which was covered by a separate claim for payment (Pet. App. C, p. 26A). The Army paid Model with eight vouchers (*ibid.*).

The Army, upon discovering that the tubes had been falsely branded, expended $16,205.54 to replace them with tubes that conformed with the contract specifications (Pet. App. C, p. 30A).[4] Model paid

[3] Respondents paid $17.50 per tube for the nonconforming tubes (Pet. App. C, p. 24A, n. 6). At the time, the market price of a government-inspected JAN 4X150G tube was $40.00 (Pet. App. C, p. 23A n. 5). Accordingly, respondents saved approximately $9,000 by supplying approximately 400 falsely branded tubes. See note 4, *infra*.

[4] The shipments from Model contained a total of 442 falsely branded tubes, which the Army replaced at a cost of $40.82 per tube. The district court found, however, that "[o]nly 397 of these tubes can be identified by serial number as having been supplied by [respondents]" (Pet. App. C, p. 25A). The cost of replacing 397 tubes was $16,205.54.

the Army $16,165.84 in settlement of a contract claim based upon that expenditure (Pet. App. C, pp. 27A, 35A).[5]

The United States then brought this suit against respondents under the False Claims Act, requesting multiple $2,000 forfeitures and double damages. The district court found that respondents, "[b]y knowingly affixing or causing to be affixed false markings on the tubes and by certifying that all materials furnished conformed to the applicable specifications, * * * caused Model to present thirty-five claims for payment to the United States" (Pet. App. C, p. 28A). The court determined that each of the 35 false claims for payment constituted a separate and complete violation of the Act and therefore that the United States was entitled to 35 forfeitures in the total amount of $70,000 (Pet. App. C, p. 38A). However, the court reasoned that Model's payment had reduced the amount of damages sustained by reason of respondents' fraudulent acts to $39.70, and therefore awarded double damages of only $79.40 (Pet. App. C, p. 35A).[6]

[5] Model paid the Army $18,000 as damages for the breach of contract; that figure represented $40.72 for each of the nonconforming tubes supplied pursuant to the contract, or a total of $16,165.84 for the 397 tubes traced to respondents (Pet. App. C, p. 35A).

[6] Respondents contended in the district court that the Army's damages should be further reduced by the fair market value of the nonconforming tubes. That contention was rejected by the court as moot once it had determined that Model's

Respondents appealed from the award of multiple forfeitures. The United States appealed from the award of only nominal double damages. The court of appeals affirmed the district court's judgment on the issue of double damages but reversed the award of multiple forfeitures.

The court of appeals acknowledged that the award was consistent with the literal language of the Act and that in like circumstances multiple forfeitures had been permitted by the Sixth Circuit in *United States* v. *Ueber*, 299 F. 2d 310 (Pet. App. A, pp. 15A-16A). The court nevertheless determined that the number of forfeitures should not be based upon the "fortuity" of the number of claims for payment actually submitted by the prime contractor. It ruled that, in cases involving fraud by subcontractors, the number of forfeitures under the Act should be determined by reference to the number of subcontracts or purchase orders whose performance was affected by the subcontractor's fraud, and not by reference to the actual number of false claims presented or caused to be presented to the United States (Pet. App. A, p. 17A). Accordingly, the court reversed as to all but one of the forfeitures.

---

payment of damages was to be credited against the government's single damages (Pet. App. C, pp. 31A-32A). Respondents took no appeal from that aspect of the district court's judgment (Pet. App. A, p. 8A).

SUMMARY OF ARGUMENT

I

Both the text of the False Claims Act and its underlying policy require a subcontractor who fraudulently causes his prime contractor to present to the United States multiple false claims for payment in connection with a government contract to pay multiple forfeitures.

A. The False Claims Act imposes a $2,000 forfeiture for presenting, or causing to be presented, to the United States "any" false claim for payment. Accordingly, the statutory violation is complete upon the presentation of the first false claim, and a forfeiture arises on account of that violation; each additional false claim constitutes a separate and complete violation that gives rise to an additional forfeiture. This reasoning has long been applied in cases involving prime contractors to impose a separate forfeiture for each false claim, without regard to the number of contracts affected by the fraud. See, *e.g.*, *United States* v. *Woodbury*, 359 F. 2d 370, 377-378 (C.A. 9). The same reasoning logically extends to violations committed by subcontractors. Cf. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 540-545. When a subcontractor, by means of fraudulent misrepresentations, causes his prime contractor to present a false claim to the United States, the statutory violation is complete and the subcontractor is subject to a $2,000 forfeiture; when, as a further consequence of such misrepresentations, successive false claims are pre-

sented, each such claim represents a new violation that gives rise to an additional forfeiture. *United States* v. *Ueber*, 299 F. 2d 310 (C.A. 6).

The court of appeals below acknowledged that "[i]f literally applied the [False Claims Act] would permit a separate $2000 forfeiture * * * for each invoice submitted by the main contractor (in this case 35)" (Pet. App. A, p. 16A), but nevertheless imposed only one forfeiture because respondents' "fraud affected the performance of a single purchase order" (Pet. App. A, p. 17A). There is no basis in the statute for limiting the number of forfeitures to the number of subcontracts or purchase orders. The focus of the Act is upon the presentation of false claims, not upon the existence of contractual relations. See *United States* v. *Neifert-White Co.*, 390 U.S. 228, 233.

This Court's decision in *United States ex rel. Marcus* v. *Hess*, *supra*, does not support the result below. Although the effect of the ruling in *Hess* was to award one forfeiture for each subcontract or project affected by the subcontractors' fraud, that result was based upon the uncontested finding in that case that in each project there had been a single false or fraudulent claim. Here there were 35 such claims.

B. The False Claims Act was intended to further two interrelated objectives—deterrence and restitution. The holding below, limiting the number of forfeitures under the Act to the number of subcontracts or purchase orders affected by the fraud, defeats both objectives. Minimization of a civil penalty necessarily minimizes that penalty's deterrent value.

And the award of a single $2,000 forfeiture in a case such as this is unlikely to cover even the costs of investigating the false claims, let alone the costs of prosecuting the claimants.

The court of appeals was concerned that an award of multiple forfeitures would constitute a criminal rather than a civil penalty. But this Court, in *United States ex rel. Marcus* v. *Hess*, *supra*, expressly held, in a case involving the award of 56 forfeitures, that the forfeiture provision of the Act is civil, not criminal. Certainly in the circumstances here, where respondents deliberately engaged in a scheme to defraud the government for personal gain by supplying nonconforming equipment to the military, the imposition of 35 forfeitures is not an unreasonable civil sanction.

The court of appeals also believed that the number of forfeitures awarded should be based "upon conduct of the [defendant subcontractors] rather than upon the fortuity of the number of invoices submitted by the main contractor" (Pet. App. A, p. 17A). But respondents in fact committed a number of fraudulent acts, including the submission of multiple false claims, the making of multiple false entries, and the participation in a conspiracy, that, if committed by a prime contractor, would unquestionably have given rise to multiple forfeitures. There is no reason for applying a more lenient standard to subcontractors, such as respondents, than to prime contractors.

II

The courts below should not have considered the government's contract recoveries from the prime contractor in computing the single damages sustained by the United States as a consequence of respondents' fraud. The focus of the statute is on the total amount of damages caused by the fraud, not on the difference between that amount and any amounts received in compensation from third parties.

The practical effect of the decision below may be to nullify the double-damages provision in cases involving subcontractor fraud. The government's normal first recourse in such cases is a claim against the prime contractor for damages for breach of contract. Where the prime contractor is solvent, by the time the subcontractor has been adjudged in violation of the Act the government in most cases will have substantially recovered the losses occasioned by the fraud. But it is not appropriate in such cases to insulate the fraudulent subcontractor, as the courts below have done, from virtually any liability for the payment of statutory damages to the United States merely because of the government's diligence in pursuing its contract remedies.

We believe the proper result in such cases to be an assessment against the subcontractor of double the amount of the government's pre-recovery damages, followed by the equitable allowance of a credit in the amount of the government's recovery from the prime contractor.

* * * * * *

The combined effect of the errors below was to eviscerate completely the deterrent effect of the False Claims Act in cases involving subcontractor fraud. Respondents, by their fraud, achieved a direct savings in cost of approximately $9,000. The total amount of the forfeiture and damages awarded by the court of appeals was only $2,079.40. The threat of such a disproportionately small penalty is unlikely to deter any subcontractor from attempting to defraud the government: if the fraud goes undetected, the subcontractor enhances his profit and pays no penalty whatsoever; if the fraud is discovered, the subcontractor pays back the government only a small fraction of his illegal gain. The decision below thus converts the False Claims Act into little more than an inexpensive license to defraud the government—a license, moreover, that is payable only upon discovery of the fraud.

ARGUMENT

I

A SUBCONTRACTOR WHO FRAUDULENTLY CAUSES HIS PRIME CONTRACTOR TO PRESENT TO THE UNITED STATES MULTIPLE FALSE CLAIMS FOR PAYMENT IN CONNECTION WITH A GOVERNMENT CONTRACT IS LIABLE FOR MULTIPLE FORFEITURES UNDER THE FALSE CLAIMS ACT

In disallowing the multiple forfeitures awarded by the district court, the court of appeals ignored both the language and the purpose of the False Claims

Act. We will show that both the text of the Act and its underlying policy require a subcontractor who fraudulently causes his prime contractor to present multiple false claims for payment to the United States in connection with a government contract to pay multiple forfeitures.

A. The Statutory Text Prescribes A Separate $2,000 Forfeiture For Each False Claim For Payment That A Subcontractor Causes To Be Presented To The United States

The first clause of the False Claims Act, 12 Stat. 696, 698, 31 U.S.C. 231, provides that "[a]ny person * * * who shall make or cause to be made, or present or cause to be presented, for payment or approval, * * * any claim upon * * * the United States, or any department or officer thereof, knowing such claim to be false * * * shall forfeit and pay to the United States the sum of $2,000."[7] It is undisputed that a subcontractor violates that clause of the Act by causing his prime contractor to present a false claim to the United States. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 540-545. See also *United States*

[7] The original version of the Act contained both civil and criminal sanctions. In the Revised Statutes of 1878, the Act was divided into two separate provisions—Section 5438, which contained the criminal prohibitions, and Section 3490, which imposed civil sanctions for violations of the criminal statute. The criminal prohibitions were subsequently altered and codified in 18 U.S.C. 287 and 1001. But the civil sanctions were codified unaltered in 31 U.S.C. 231. See Pet. App. A, pp. 9A-11a.

v. *Ueber*, 299 F. 2d 310 (C.A. 6); *United States* v. *Rohleder*, 157 F. 2d 126 (C.A. 3).[8]

The Act imposes a $2,000 forfeiture for the presentation to the United States of "*any* claim * * * knowing such claim to be false" (emphasis added). Accordingly, in cases involving prime contractors, the courts have uniformly held that the Act imposes a separate forfeiture for each false claim, without regard to the number of contracts affected by the fraud. See *United States* v. *Woodbury*, 359 F. 2d 370, 377-378 (C.A. 9); *United States* v. *National Wholesalers*, 236 F. 2d 944, 950 (C.A. 9), certiorari denied, 353 U.S. 930; *United States* v. *Grannis*, 172 F. 2d 507, 515 (C.A. 4), certiorari denied, 337 U.S. 918. See, also, *Faulk* v. *United States*, 198 F. 2d 169, 171 (C.A. 5). Cf. *Toepleman* v. *United States*, 263 F. 2d 697, 698-700 (C.A. 4).[9] These decisions reflect a proper understanding of the Act: since the Act imposes a forfeiture for "any" false claim, the statutory violation is complete upon the presentation of

[8] The district court found that respondents had violated the Act by causing their prime contractor, Model, to present false claims for payment to the United States (Pet. App. C, p. 28A), and respondents did not appeal from that determination. It is, moreover, clear that each of the 35 claims for payment presented by Model was a "claim" within the meaning of the Act. See *United States* v. *McNinch*, 356 U.S. 595, 598-600.

[9] The same result has been reached under the Surplus Property Act, 40 U.S.C. 489(b). *United States* v. *Rubin*, 243 F. 2d 900 (C.A. 7); *Daniel* v. *United States*, 234 F. 2d 102 (C.A. 5). This Court has noted that that statute should be construed in harmony with the False Claims Act. *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 152.

the first false claim, and a forfeiture arises on account of that violation; each additional false claim constitutes a separate and complete violation that gives rise to an additional forfeiture.

This reasoning logically extends to violations committed by subcontractors. When a subcontractor, by means of fraudulent misrepresentations, causes his prime contractor to present a false claim to the United States, the statutory violation is complete and the subcontractor, accordingly, is subject to a $2,000 forfeiture; when, as a further consequence of such misrepresentations, successive false claims are presented, each such claim represents a new violation that, under the plain language of the statute, gives rise to an additional forfeiture. This reading of the Act was applied in straightforward fashion in *United States* v. *Ueber*, *supra*, 299 F. 2d at 313-314 (emphasis in original):

> *Was it error to assess a $2,000.00 forfeiture for each public voucher submitted?* The evidence disclosed that the Ueber Company [the subcontractor] submitted 422 invoices to Kaiser and Chase [the prime contractors], each of which contained false claims for direct labor. From these invoices, Kaiser prepared and submitted to the government 33 vouchers and Chase presented 21 of such vouchers. The District Judge assessed a $2,000.00 forfeiture for each of the 54 vouchers so presented to the United States. Ueber contends that only two of such forfeitures should have been imposed, one for the subcontract with Kaiser and one for the Chase subcontract. We disagree.

> The conduct proscribed by [the False Claims] Act], as applicable here, consisted of acts of causing false claims to be presented to the government. Each voucher which Ueber caused to be submitted through Kaiser and Chase was a separate act justifying an assessment of a separate forfeiture. * * * Plaintiff's complaint did not charge that the entering into subcontracts with Kaiser and Chase in any way violated [the Act]. These contracts were valid. The vouchers submitted to the United States to obtain payments under such contracts made up the acts which offended the False Claims Act. If after remand, as hereinafter ordered, the District Judge's findings [on the question of *scienter*] are sustainable, we would find no error in the assessment of forfeitures in the total amount of $108,000.00.

The same reasoning applies here. Each of the 35 false claims for payment that respondents caused Model to present to the United States "was a separate act justifying an assessment of a separate forfeiture." This is, moreover, the only result that comports with this Court's observation, in the course of upholding 56 forfeitures in *United States ex rel. Marcus* v. *Hess*, *supra*, 317 U.S. at 552, that the False Claims Act "requires that the $2,000 forfeit be paid for doing 'any' of the [prohibited] acts * * *." See, also, *Toepleman* v. *United States*, *supra*, 263 F. 2d at 698-700. Cf. *Shea* v. *Vialpando*, 416 U.S. 251, 260.

The court of appeals below acknowledged that "[i]f literally applied the [False Claims Act] would per-

mit a separate $2000 forfeiture * * * for each invoice submitted by the main contractor (in this case 35)" (Pet. App. A, p. 16A). The court nevertheless refused to give the Act literal application in this case. Instead, the court held that "there should under the first clause of [the Act] have been a single forfeiture since the [respondents'] fraud affected the performance of a single purchase order from Model to [respondents' corporation]" (Pet. App. A, p. 17A).

There is no basis in the statute for limiting the number of forfeitures to the number of subcontracts or purchase orders affected. The Act imposes a forfeiture specifically for the presentation of a false "claim." A subcontract or a purchase order is not a "claim" within the meaning of the Act. This Court has noted, with specific reference to the False Claims Act, that " 'the conception of a claim against the government normally connotes a demand for money or for some transfer of public property.' " *United States* v. *McNinch*, 356 U.S. 595, 599.

The false claims giving rise to the forfeitures here were the 35 invoices submitted by Model to the Department of the Army, each requesting payment on the basis of a fraudulent representation concerning a separate shipment of goods. The number of contracts between Model and the Army, or of subcontracts between respondents and Model, or of purchase orders issued by Model to respondents, is irrelevant under the Act. The focus of the Act is upon "claims," not upon contractual relations. See *United States* v. *Neifert-White Co.*, 390 U.S. 228, 233. The critical

determinant of the number of forfeitures under the first clause of the Act is therefore not the number of contracts affected by the fraud but rather the number of false claims for payment presented to the United States. *E.g.*, *United States* v. *National Wholesalers, supra; United States* v. *Ueber, supra.* There were 35 such claims presented here, and the government accordingly is entitled to the payment of 35 forfeitures.

In deciding to the contrary, the court of appeals purported to rely upon *United States ex rel. Marcus* v. *Hess, supra*, which the court apparently read as limiting the number of forfeitures under the first clause of the Act to the number of government contracts or projects affected by the fraud. But *Hess* cannot be so read. That case involved a *qui tam* action brought by an informer against government subcontractors who had conspired to defraud the government on each of 56 projects funded by the Public Works Administration. The district court had determined that "in each project there was a single, false, or fraudulent claim made arising from the collusive-bidding plan" (41 F. Supp. 197, 216) and therefore awarded 56 forfeitures.[10] The court of appeals reversed, holding that the only claims made by

---

[10] The forfeitures were awarded under the first clause of the Act, relating to the presentation of false claims. The court rejected the informer's argument that the government was entitled under the second clause of the Act to a forfeiture for each false certificate issued as a result of the conspiracy. The informer did not appeal from that determination.

the defendant subcontractors were against their prime contractor, not against the United States, and therefore that no false claims had been presented to the United States within the meaning of the Act (127 F. 2d 233, 236-237). This Court reversed in turn, holding that the Act applies to false claims submitted by a prime contractor as a consequence of its subcontractors' fraudulent representations and reinstating the award of multiple forfeitures.

Thus the effect of the Court's ruling in *Hess* was to award one forfeiture for each subcontract, or "project." But that result was based upon the uncontested finding that "in each project there was a single, false, or fraudulent claim * * *" (41 F. Supp. at 216). Nothing in *Hess* suggests that the number of forfeitures under the Act would, in other cases, be restricted to the number of separate contractual relationships.[11]

---

[11] The court of appeals below may have relied upon this Court's observation in *Hess* (317 U.S. at 552) that "[t]he incidence of the fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office" (see Pet. App. A, p. 15A). But that observation was not made in the context of restricting the number of forfeitures to the number of projects. To the contrary, the Court was there addressing the subcontractors' argument that since they had engaged in only one conspiracy, they were subject to only one forfeiture. The Court pointed out that the fraud affected all the projects (with regard to each of which a separate claim for payment had been made) and therefore that the subcontractors were liable for multiple forfeitures.

B. The Imposition of Multiple Forfeitures Furthers the Objectives of the Act

The False Claims Act was intended to further two interrelated purposes—deterrence and restitution. The Act "was originally adopted [during the Civil War] following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department." *United States* v. *McNinch*, *supra*, 356 U.S. at 599. The Act's sponsor in the Senate opened debate on the bill by emphasizing the need to deter and prevent the making of fraudulent claims against the government (62 Cong. Globe 952 (37th Cong., 3d Sess.)):

> The country, as we know, has been full of complaints respecting the frauds and corruptions practiced in obtaining pay from the Government during the present war; and it is said, and earnestly urged upon our attention, that further legislation is pressingly necessary to prevent this great evil; and I suppose there can be no doubt that these complaints are, in the main, well founded. From the attention I have been able to give the subject, I am satisfied that more stringent provisions are required for the purpose of punishing and preventing these frauds * * *.

In short, as this Court has more than once noted, "the objective of Congress in enacting the False Claims Act 'was broadly to protect the funds and property of the Government from fraudulent claims * * *' ". *United States* v. *Neifert-White Co.*, *supra*, 390 U.S. at 233.

The holding of the court of appeals below, limiting the number of forfeitures under the Act to the number of subcontracts or purchase orders affected by the fraud, would, if affirmed, substantially impair the effectiveness of the Act in deterring fraud by government subcontractors. It seems likely that, in any given case, the number of false claims for payment submitted in connection with a government contract will, as in this case, exceed the number of subcontracts affected by a subcontractor's fraud and that, therefore, the effect of the rule announced below would be to minimize the subcontractor's liability for forfeitures. Minimization of a civil penalty necessarily minimizes that penalty's deterrent value. Indeed, the decision below in essence converts the Act's forfeiture provision into little more than a $2,000 license for subcontractor fraud. That result defeats, rather than furthers, the Act's objective of "protect-[ing] the funds and property of the Government from fraudulent claims * * *." Where multiple false claims have been presented, "it would be a mockery against the intent of the statute * * * to lump all [a subcontractor's] derelictions and fraudulent practices [into a single statutory violation]." *United States* v. *Collyer Insulated Wire Co.*, 94 F. Supp. 493, 496 (D. R.I.).

A second objective of the Act is to compensate the government for the cost, delay, and inconvenience occasioned by the presentation of false claims. Indeed, this Court noted in *United States ex rel. Marcus* v. *Hess*, *supra*, 317 U.S. at 551-552, that "the chief purpose of the [Act] was to provide for restitution to the government of money taken from it by fraud, * * * that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole" and, further, that "[t]he inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress." The Court implicitly concluded in *Hess* that Congress had resolved that "problem" by providing for multiple $2,000 forfeitures in cases, such as this one, involving multiple false claims.

The objective of affording the government restitution also is substantially defeated by the decision below. The government's contractual losses resulting from a false claim ordinarily should be adequately covered by the payment of double damages under the Act. See generally pp. 26-29, *infra*. But such an award of damages is unlikely to be sufficient to compensate the government for the additional costs it incurs in investigating false claims and prosecuting the claimants. It was for this reason, as the Court noted in *Hess*, that Congress added the forfeiture provision "to make sure that the government would be made completely whole."

Where, as here, multiple false claims are involved, a single $2,000 forfeiture is unlikely to cover even the costs of investigation. In this case, for example, once it was discovered that the radio tubes appeared to have been falsely branded, it was necessary to

trace each tube, by serial number, to one of the 35 separate invoices presented by Model and, from there, to one of the three shipping lists submitted by respondents to Model.[12] That, of course, was only the beginning of the investigatory process; once the tubes had been traced to respondents, it was necessary to establish that they were in fact falsely branded and the manner in which the false branding had been accomplished. As the Fourth Circuit noted in *Toepleman* v. *United States*, *supra*, 263 F. 2d at 699:

> • • • [N]o proof is required to convince one that to the Government a false claim, successful or not, is always costly. Just as surely, against this loss the Government may protect itself, though the damage be not explicitly or nicely ascertainable.
>
> The Act seeks to reimburse the Government for just such losses. For a single false claim $2000 would not seem exorbitant. Furthermore, even when multiplied by a plurality of impostures, it still would not appear unreasonable when balanced against the expense of the constant Treasury vigil they necessitate.

The court of appeals below gave only two reasons for denying an award of multiple forfeitures, and neither of those reasons accords with either the language of the Act or its underlying policies. First, the court noted that in a case such as this literal enforcement of the Act would permit the award of forfeitures under each of the three clauses of the Act—

[12] Forty-five falsely branded tubes could not be directly traced to respondents (Pet. App. C, p. 25A).

under the first clause, for the submission of each false claim; under the second clause, for the making of each false entry; under the third clause, for conspiracy to defraud—and questioned "whether as so construed the statute would not compel the conclusion that it was penal rather than civil" (Pet. App. A, p. 16A). But this Court has already laid to rest any doubts that might once have existed concerning the civil nature of the forfeiture provisions of the Act. In *United States ex rel. Marcus* v. *Hess*, *supra*, where a total of 56 forfeitures were awarded, the Court explicitly addressed the contention that the forfeiture provisions of the Act impose a criminal penalty. The Court there observed that " '[p]unishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned,' but this is not enough to label it as a criminal statute" (317 U.S. at 551) and concluded that forfeiture proceedings under the Act "are remedial and impose a civil sanction" (317 U.S. at 549).

Moreover, in recognition of the broad language of the Act and its evident purposes of deterrence and restitution, "[i]n the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil." *United States* v. *Neifert-White Co.*, *supra*, 390 U.S. at 232. Although it is true, as the court below pointed out, that the Act, if literally applied, might have permitted the award of considerably more than

35 forfeitures (because of the possibility of multiple forfeitures under the second clause of the Act),[13] that is not a sufficient reason for artificially narrowing the statutory predicate for an award of forfeitures under the first clause. It is within the discretion of the United States, in the first instance, whether to seek the maximum number of forfeitures prescribed by the literal terms of the Act. Here, the United States sought considerably less than that maximum number. Whether in the circumstances of this case it would have been unfair and an abuse of discretion to impose multiple forfeitures under both the first and second clauses of the Act is an issue that was not before the court of appeals and is not before this Court. But there was no abuse of discretion in seeking to enforce 35 forfeitures under the first clause in light of respondents' deliberate attempt to gain a dishonest profit by supplying the Army with nonconforming equipment.

The second reason given by the court of appeals for denying multiple forfeitures was that in a case involving subcontractor fraud the number of forfeitures awarded should be based "upon conduct of the defendants rather than upon the fortuity of the number of invoices submitted by the main contractor" (Pet. App. A, p. 17A). But that is a consideration of policy that should be addressed to Congress; the statute as now written clearly prescribes a forfeiture for causing "any" false claim to be presented to the

[13] The court of appeals suggested that 439 forfeitures could be imposed here under the literal terms of the second clause alone (Pet. App. A, p. 16A).

United States, and respondents caused the presentation of 35 such claims. Moreover, the contrary statutory construction adopted by the court of appeals—a construction that limits the number of forfeitures to the number of contracts affected by the fraud—fails signally to focus "upon conduct of the defendants." Respondents, for example, themselves submitted three false invoices to their prime contractor (Pet. App. A, p. 8A), made over 400 false entries in furtherance of their fraudulent scheme (see note 13, *supra*), and engaged in a conspiracy to defraud; if respondents had been prime contractors, these multiple acts would unquestionably have given rise to multiple forfeitures. The court states no reason, and we see none, for applying a more lenient standard to subcontractors than to prime contractors.

It is true that the particular measure of forfeitures applied by the government in this case—the number of false claims submitted by the prime contractor as a consequence of respondents' fraud—is not directly related to the number of respondents' own fraudulent acts. Respondents had no control over or knowledge of the number of invoices that would be submitted to the United States. However, they could reasonably have assumed that the radio kits to be supplied under the contract would be shipped in separate lots and that, accordingly, multiple claims for payment would be made. When a subcontractor acts to defraud the government, he does so at his peril and at the anticipatable risk that his prime con-

tractor will, as here, submit multiple false claims as a consequence of that fraud. Cf. *United States* v. *Ueber, supra.*

In short, the assessment of multiple forfeitures in a case such as this involves no unfair surprise, it conforms with the literal wording of the False Claims Act, and it furthers the Act's objectives of deterrence and restitution.

II

UNDER THE FALSE CLAIMS ACT, SINGLE DAMAGES RESULTING FROM A SUBCONTRACTOR'S FRAUD ARE NOT REDUCED BY THE AMOUNT OF ANY RECOVERIES FROM THE PRIME CONTRACTOR

The False Claims Act imposes not only a $2,000 forfeiture but, "in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing [the fraudulent] act * * *." The district court determined that the total amount of actual damages attributable to respondents' fraudulent acts was $16,205.54, the cost of replacing the 397 falsely branded tubes (Pet. App. C, p. 30A).[14] From that total, however, the court sub-

[14] Respondents had contended that the replacement cost should be reduced by the fair market value of the falsely branded tubes delivered to the government in order to determine actual damages; the district court disregarded that contention and respondents took no appeal on that issue. See note 6, *supra.* Accordingly, that issue is no longer present in this case. We note, however, that the rule generally applied by the courts is that when a defrauder thrusts upon the government unwanted goods that have no ready utility to it, the market value of those goods is not applied to reduce the government's damages under the Act. See, *e.g.*, *Toepleman* v. *United States, supra; Faulk* v. *United States, supra; United States* v. *Ben Grunstein & Sons Co.*, 137 F. Supp. 197 (D.N.J.); *United States* v. *Collyer Insulated Wire Co., supra.*

tracted the government's recovery from Model, the prime contractor, of $16,165.84 for damages for the breach of contract caused by respondents' shipments of nonconforming tubes, to arrive at the figure of only $39.70 in single damages. The district court thereupon awarded double damages of $79.40, and the court of appeals affirmed.

The recovery from Model should not have been applied in reduction of the government's single damages. The total amount of actual damages the United States sustained by reason of respondents' fraud was, as the district court acknowledged, $16,205.54. Although the recovery from Model *compensated* for the major portion of those damages, it did not *reduce* those damages within the intendment of the Act. Cf. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 Minn. L. Rev. 669 (1962). The focus of the statute is on the total amount of damages caused by the fraud, not on the difference between that amount and any amounts received in compensation from third parties. The courts below read the Act as permitting doubling only of the "amount of *uncompensated* damages which the United States may have sustained * * *." There is no basis for that reading either in the statutory text, or, as we now show, in the underlying policies of the Act.

The practical effect of the decision below may be to nullify the double-damages provision in cases involving subcontractor fraud. The government's normal first recourse in such cases is a claim against the prime contractor for damages for the breach of contract caused by the subcontractor's fraud; typically, as in this case, the prime contractor will have no defense on the merits to such a suit for breach of contract. Thus, where the prime contractor is solvent, by the time the subcontractor has been adjudged in violation of the Act the government in most cases will have substantially recovered the losses occasioned by the fraud. But it is not appropriate in such cases to insulate the subcontractor, as the courts below have done, from virtually any liability for the payment of statutory damages to the United States merely because of the government's diligence in pursuing its contract remedies against the prime contractor. "[T]he unscrupulous defendants should not be permitted to benefit from the costly and time-consuming collection efforts of the government." *United States* v. *Globe Remodeling Co.*, 196 F. Supp. 652, 657 (D. Vt.).

This is not to say that recoveries from the prime contractor should be ignored completely. We believe the appropriate result in a case such as this to be an assessment against the subcontractor of double the amount of the government's prerecovery damages, followed by the equitable allowance of a credit against the doubled damages in the amount of the

government's recovery from the prime contractor.[15] That result would achieve the statutory objective of ensuring that the United States receive double the actual contract damages resulting from the fraud. It would also preserve the deterrent effect of the double-damages provision by making the subcontractor, who presumably will be liable to the prime contractor for the amount of the latter's payment to the government, ultimately liable for the entire amount of the double damages that Congress intended the government to receive. In contrast, "if repayments were subtracted before doubling the original losses, the double damage provision would be rendered a nullity in instances where the government has fully succeeded in its efforts to secure repayments." *United States* v. *Globe Remodeling Co., supra*, 196 F. Supp. at 657.

* * * *

For the reasons stated above, the court of appeals erred on both the question of multiple forfeitures and that of double damages. But it should further be pointed out that in this case the combined effect of those errors was to eviscerate the False Claims Act as a deterrent to the commission of fraud by

---

[15] The application of that rule in this case would be as follows:

single damages	$16,205.54
double damages	32,411.08
less, recovery from Model	16,165.84
respondents' liability for damages	$16,245.24

government subcontractors. Respondents deliberately engaged in a scheme to defraud the government for personal gain by supplying nonconforming equipment to the military; by doing so they achieved a direct savings in cost of approximately $9,000. See note 3, *supra*. The forfeiture and damages awarded by the court of appeals—$2,079.40—is not even great enough to deprive respondents of their ill-gotten gains.

The threat of such a disproportionately small penalty is unlikely to deter any subcontractor from attempting to defraud the government: if the fraud goes undetected, the subcontractor enhances his profit and pays no penalty; if the fraud is discovered, the subcontractor pays back to the government only a small fraction of his illegal gain. There are, of course, criminal penalties that remain as a deterrent to such fraudulent conduct. See 18 U.S.C. 287 and 1001. But Congress intended that the civil penalties of forfeiture and double damages, which could be imposed in a civil proceeding on the basis of the preponderance of the evidence, would also act as a potent deterrent to the presentation of false claims. That congressional objective was almost wholly defeated by the decision below, which converted the False Claims Act "into a minor tax upon a violation which could reap large financial benefits to the perpetrator." *United States* v. *ITT Continental Baking Co.*, No. 73-1290, decided February 19, 1975 (slip op., p. 9).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court with instructions to enter a judgment for the United States of $70,000.00 in forfeitures and $16,245.24 in damages.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

KEITH A. JONES,
Assistant to the Solicitor General.

STEPHEN F. EILPERIN,
DAVID M. COHEN,
Attorneys.

APRIL 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 572741 137